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No. 07-723

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In The Supreme Court of the United States

SUPERVALU, INC.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

In appropriate circumstances, does the authority under ERISA section 4212(c), 29 U.S.C. § 1392(c), to assess withdrawal liability without regard to any transaction having a principle purpose to evade or avoid liability, authorize a multi-employer pension plan to disregard a Termination Agreement where it is found that the only purpose of the Termination Agreement is to enable the employer to escape incurring a significant liability to the plan expected as of the closing date and divide the money diverted from the plan between itself and another party?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding are adequately set forth in the Petition.

CORPORATE DISCLOSURE STATEMENT

The Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund is a employee benefit trust fund and is not a corporation with attendant stock ownership. It has no parent corporation and there is no publicly held company that owns 10% or more of the its stock.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("Fund"), respectfully requests that the Court deny the Petition for a Writ of Certiorari ("Petition") submitted by Petitioner, SUPERVALU, Inc.

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED IN THE CASE

Petitioner is correct that this case involves provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* Petitioner is also correct that the primary statute in the case is section 4212(c) of ERISA.

However, Petitioner fails to identify 29 U.S.C. § 1001a, a statutory provision which was chiefly relied upon by the Third Circuit for its interpretation of section 4212(c). That statute, which expressly sets forth "Additional Congressional Findings and Declaration of Policy," is quoted extensively by the Respondent in this Brief.

COUNTER STATEMENT OF THE CASE

Respondent Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("Fund") determined that withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") should be based on the date that employment terminated at a facility being shut down by SUPERVALU, Inc. ("SUPERVALU") and covered under collective bargaining agreements requiring contributions to the Fund. In reaching this determination, the Fund applied ERISA section 4212(c) and disregarded a Termination Agreement's terms which ended SUPERVALU's obligation to contribute on the day before the last day of the Fund's July 1, 2001/June 30, 2002 plan year, which was four weeks prior to the date employment terminated at the facility. SUPERVALU believed that this four week premature cessation of pension coverage would allow it to escape a substantial withdrawal liability assessment based on the facility closing date. Petitioner does not contest the fact that the sole purpose of the

transaction was an attempt to escape imposition of withdrawal liability.

The factual findings of the arbitrator, which were left undisturbed in all subsequent court decisions, were that SUPERVALU's purpose in structuring the Termination Agreement was to avoid withdrawal liability and share the savings with the soon to be terminated employees. Pet. App. 71a-75a. The arbitrator rejected Petitioner's suggestion to create an exception based on the union's acquiescence to the transactions, and therefore, upheld the Fund's assessment. Pet. App. 89a-90a.

The district court, adopting the opinion of the magistrate judge, Pet. App. 39a-40a, concluded that while the Termination Agreement between SUPERVALU and the union "seems, on its face, unfair," it was not illegal. It concluded that MPPAA made it "possible for employers and unions to squeeze through statutory loopholes in order to realize an economic advantage at the expense of others." Pet. App. 65a.

The Fund appealed the district court's reversal of its determination that section 4212(c) permitted it to disregard the Termination Agreement's terms. The Court of Appeals for the Third Circuit held that since the only purpose of the Termination Agreement was to evade or avoid withdrawal liability, and since the transaction was contrary to the statutory purpose of MPPAA, the district court erred in creating an exception to the plain language of section 4212(c).

SUMMARY OF THE ARGUMENT

This case presents very unique and unusual facts in which an employer and union terminate pension coverage for employees at a facility which was to be shut down four weeks later with the expectation that the premature termination would allow the employer to escape a substantial withdrawal liability assessment arising from the Fund's deteriorating funding status.

Petitioner's contention that the Third Circuit's interpretation and application of section 4212(c) conflicts with a Ninth Circuit decision fails to account for the differing factual situations which both courts analyzed. The Third Circuit itself explained that its decision was not in conflict with that of the Ninth's Circuit based on the different factual circumstances of the transactions in the two cases.

The extenuated hypothetical cases presented by Petitioner are not actual cases or controversies. Speculation over potential confusion over the precedent of this case does not warrant the grant of certiorari. Furthermore, the Third Circuit's analytical approach, interpreting a statute according to its plain meaning and consistent with statutory findings and policy, is sound.

ARGUMENT FOR DENIAL OF THE WRIT

I. The Third Circuit's Decision Does Not Conflict with *Cuyamaca Meats* or Any Other Circuit Court Decision

Petitioner claims that the Third Circuit's decision conflicts with the Ninth Circuit's decision in *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). Petition 14-18. However, there is no conflict between those two cases because the Third Circuit's decision involved the application of section 4212(c) to unique facts, which were very different than those in *Cuyamaca Meats*. Both the Third and Ninth Circuits considered the factual patterns of each case, and employed the same analytical approach, looking at both the plain language and the goals of the statute. The Third Circuit properly applied section 4212(c) to the transaction in the instant case, explaining that, unlike *Cuyamaca Meats*, the distinctive factual setting underlying this transaction is contrary to MPPAA's statutory purpose, as set forth in MPPAA itself at 29 U.S.C. § 1001a.

A. Unlike in *Cuyamaca Meats*, in the Instant Case, the Transaction Violated MPPAA's Goals, as Set Forth By Congress in 29 U.S.C. § 1001a

The Third Circuit recognized that although there are superficial similarities between the instant case and *Cuyamaca Meats*, a closer look at the cases reveals important distinctions. It found that, like the

Termination Agreement entered into by the Petitioner, the transaction in *Cuyamaca Meats* also violated the plain meaning of the statute. Pet. App. 24a, fn 10. However, unlike the Termination Agreement, the transaction in *Cuyamaca Meats* "did not frustrate the purpose of the statute," and, as a result, the Ninth Circuit had "held that the employers did not violate the statute." *Id.*

In its decision, the Ninth Circuit looked at whether the transaction violated the purpose of MPPAA. In doing so, it found that the purpose of 29 U.S.C. § 1381(a), which imposes withdrawal liability, "is to ensure that multiemployer plans are not rendered insolvent by withdrawing employers." *Cuyamaca Meats*, 827 F.2d at 495-496.[1]

Turning to the facts of the case before it, the Ninth Circuit determined that the transaction did not violate the purpose of MPPAA. It reached this conclusion because the employers' delay in withdrawing from the fund did not threaten the fund's financial stability. Thus, because of the unique circumstances surrounding the transaction, the delay did not bring about the harm that MPPAA was enacted to remedy.

> The Employers' reaction to the MPPAA, their delay in withdrawing from the Pension Fund, *did not undermine the goals of the MPPAA*. If an employer hesitates to withdraw from a

[1] The Ninth Circuit also looked at section 4212(c)'s legislative history. *Cuyamaca Meats*, 827 F.2d at 499 (citing 126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson)).

> multiemployer pension fund which has high unfunded benefit liability, the pension fund escapes the dangers sought to be abated by the withdrawal liability provisions. The Employers' May 5, 1983, offer to Local 229A, and the Employers' resulting delay in withdrawal from the Pension Fund was a candid reaction to the changing financial status of the Pension Fund and to the provisions of the MPPAA. *The May 5, 1983, offer posed no threat to the financial stability of the Pension Fund.*

Id. (emphasis added)

To determine whether the Termination Agreement violated the statutory goals, the Third Circuit looked at 29 U.S.C. § 1001a, which is titled "Additional Congressional findings and declaration of policy." The Third Circuit quoted 29 U.S.C. § 1001a(a) for the proposition that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, [adversely affecting the plan,] its participants and beneficiaries, and labor-management relations." (quoted at Pet. App. 8a).

29 U.S.C. § 1001a(b) contains additional Congressional findings indicating a desire to encourage pension plan continuation and to protect plan participants.

> The Congress further finds that –
>
> (1) it is desirable to modify the current multiemployer plan termination insurance

> provisions in order to increase the likelihood of protecting plan participants against benefit losses; and
>
> (2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

Section 1001a(c) contains MPPAA's policy goals, which include "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, . . . to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and . . . to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans."

In addition to citing section 1001a, the Third Circuit also quoted MPPAA's legislative history, which indicated that the statute was intended to "relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers." H.R. Rep. 869, 96th Cong., 2d Sess., 67, *reprinted* in 1980 U.S. Code Cong. & Ad. News 2918, 2935. (Cited in Pet. App.

8a).[2] The Third Circuit additionally cited a number of cases indicating that MPPAA was intended to ensure that withdrawing employers paid a share of a plan's unfunded benefit liability. Pet. App. 7a-8a, 23a-24a.

The Third Circuit found that "SUPERVALU engaged in exactly the type of conduct Congress was trying to prevent," and that its transaction "threatened the financial stability of the Fund as SUPERVALU withdrew in order to avoid paying its share of

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[2] MPPAA was enacted to discourage employers' efforts to "game the system" by terminating participation before they became legally responsible for the plan's existing unfunded benefit liability. *See Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984). In *Gray*, this Court set forth the history of the enactment of MPPAA, and described the factors that motivated Congress to enact the statute. After ERISA was passed, but prior to the enactment of MPPAA, withdrawing employers were not, in most cases, responsible for their share of the plan's unfunded vested benefits. *Id.* at 721. The system encouraged employers to withdraw as soon as possible to avoid paying the cost increases caused by the withdrawals of other contributing employers, the "so-called inherited liabilities." *Id.* at 722 (fn 2)

In order to remedy this (and other flaws in the pension benefit statutory scheme), Congress passed the MPPAA in 1980. *See id.* at 722-723. Congress was so intent on discouraging withdrawals that it made the MPPAA effective retroactively. *Id.* at 730-731. It was "concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered," and thus made the statute retroactive "to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute." *Id.*

the existing unfunded vested benefit liability." It thus concluded that "SUPERVALU's conduct violated not only the plain language of the statute, but also its purpose." Pet. App. 23a-24a.

The distinctions the Third Circuit made between this case and *Cuyamaca Meats* echoes similar distinctions made by Arbitrator Nagle in the initial decision issued in the dispute between Petitioner and Respondent. Arbitrator Nagle pointed out that the Ninth Circuit had emphasized that the transaction, which involved a continuation of contributions to the plan, did not violate MPPAA's statutory goals, and did not harm the fund's financial stability. He contrasted this with the transaction in the instant case which arose in a "significantly different context." Pet. App. 85a-86a.

Arbitrator Nagle noted that the Ninth Circuit had focused on the purpose of section 4212(c), rather than the statute's language, and that it had determined that the "*purposes* of this provision did not warrant its application to the facts before it." *Id.* at 84a (emphasis in original). According to Arbitrator Nagle, "the Ninth Circuit concluded . . . that if an employer manages to continue its contributions through an entire plan year in which the pension plan's position has markedly improved, the employer has acted consistently with the broader statutory purposes, and should not be penalized for having done so." In such a situation, the payment of withdrawal liability "would simply provide a windfall to the Plan and the remaining employers." *Id.*

Arbitrator Nagle found that "the facts in the instant case are quite the opposite," with Petitioner withdrawing from the Fund just before the end of the plan year in an "attempt[ ] to avoid any responsibility for the unfunded liabilities" incurred by the Fund. *Id.* at 84a-85a. "As a result, the full burden of funding those liabilities would be shifted to those contributing employers who remained – one of the consequences that MPPAA was specifically intended to prevent." *Id.* at 85a. Petitioner's withdrawal was especially harmful to the Fund, given that "the Company represented 23% of the Fund's contribution base." *Id.*

Because of the significant factual differences between the two cases, there is no conflict between the Third Circuit's opinion and *Cuyamaca Meats*. As the Third Circuit and Arbitrator Nagle recognized, the key factor for the court in *Cuyamaca Meats* was the fact that the plan's funding improved between the old and new plan years. The Ninth Circuit determined that a transaction which delays an employer's withdrawal into a year with improved funding, and which does not harm the fund, is not an evasion or avoidance of withdrawal liability. In other words, the aim was not to evade a liability, but rather to get a share of the funding improvement.

The Third Circuit was faced with a completely different fact pattern, one in which an employer took the unusual step of terminating a long-standing benefit just weeks before the benefits would have ended as a result of a facility closing. Pet. App. 22a. Unlike the continuation of contributions past a plan

year in *Cuyamaca Meats*, Petitioner attempted to hasten the cessation of its obligation to contribute to the Fund. Unlike *Cuyamaca Meats*, this cessation would have significantly harmed the Fund.

Because of these factual dissimilarities, the Third Circuit was able to harmonize its decision with *Cuyamaca Meats*. The application of different sets of stipulated facts to legal precepts leading to different conclusions does not create a "conflict with the decision of another US Court," Supreme Court Rule 10, and does not justify this Court granting certiorari.

II. The Third Circuit's Decision Will Clarify the Application of Section 4212(c)

A. The Decision Will Not Lead to Confusion by Other Courts

Petitioner sets forth extravagant hypotheticals to try to show that the Third Circuit's decision will cause a slippery slope, leading courts to incorrectly apply section 4212(c). Specifically, it claims that the Third Circuit's opinion allows the statute to be applied to an unlimited range of transactions, and will thus "destabilize the law applicable to MPPAA withdrawal liability." Petition 18-21.

Section 4212(c) should be applied in accordance with the plain language of the statute, which states that it may be applied to "*any* transaction" which has "a principal purpose . . . to evade or avoid [withdrawal] liability." (emphasis added). The Third Circuit's opinion was in accord with the statutory text,

and refused to apply an exception which does not appear in the language of the statute itself. It therefore applied section 4212(c) to a transaction whose principal purpose was unquestionably to evade or avoid withdrawal liability.[3]

Petitioner fails to explain how a broad interpretation (which is in accordance with the broad language of the statute) could lead to confusion. There is no reason that courts and arbitrators should have any more trouble applying a broad interpretation than a narrow one. In fact, almost fifteen years ago, the Third Circuit refused to limit the term "transaction" in applying 29 U.S.C. § 1369(a), the parallel statute to section 4212(c) which applies to single employer pension plans. *See Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.* 998 F.2d 1192 (3d Cir. 1993), *cert. denied, White Consol. Industries, Inc. v. Pension Ben. Guar. Corp.*, 510 U.S. 1042 (Jan. 10, 1994) (No. 93-661).[4] Despite this broad interpretation

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[3] *See* the Third Circuit's decision, Pet. App. 21a-22a ("There is no doubt that SUPERVALU had the intent required by the statute. . . . As there was no other reason for SUPERVALU to enter the Termination Agreement, its intention to evade or avoid withdrawal liability was a principal purpose, if not its only purpose.") Petitioner does not contradict this finding in their Petition.

[4] In *White Consolidated,* 998 F.2d 1192, 1194-1195 (3d. Cir. 1993), the Pension Benefit Guarantee Corporation applied section 1369(a) to disregard a transaction in which subsidies were paid by a corporation to a pension plan after it had sold a failing business which sponsored the plan. The contributions were meant to prop up the plan so that it could survive for a few years, relieving the former employer of liability. *Id.* at 1195. The

(Continued on following page)

by the Third Circuit, there has not been any apparent confusion among lower courts regarding the application of section 1369(a).[5]

B. The Third Circuit's Decision Does Not Conflict with the Non-Precedential *ITU* Opinion

Petitioner also argues that certiorari should be granted because it believes that the Third Circuit's decision is at odds with the arbitrator's decision in *ITU Pension Plan and Ft. Worth Star Telegram*, 5 E.B.C. 1193 (E. Mittleman Arb. 1984). Petition 22-25. However, like *Cuyamaca Meats*, *ITU* can be reconciled with the Third Circuit's decision because that

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court found that the statute broadly applied to "any transaction . . . to evade liability," which could include the contributions made by the company. *Id.* at 1200.

[5] In a footnote, Petitioner claims that almost every advisory opinion issued by the Pension Benefit Guarantee Corporation ("PBGC") that mentions section 4212(c) "has involved an asset sale, the sale or spin-off of a subsidiary, or both." Petition 21-22, fn 8. However, the PBGC never suggested that these were the only scenarios in which section 4212(c) could be applied. Furthermore, given the unique set of facts in this case, it is not unusual that the PBGC would not have been presented with a similar case. Finally, as the PBGC itself recognizes, it is not the proper channel for a dispute regarding withdrawal liability. *See, e.g.*, PBGC Opn. 81-41 (MPPAA "provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and, if necessary, in the courts," and, as a result, "the PBGC will ordinarily avoid interjecting itself in such a determination by issuing an opinion on the application of the law.").

case had a vastly different fact pattern than the instant case.

As an initial matter, Respondent points out the obvious fact that *ITU* was a decision issued by an arbitrator, not a circuit court. Even if this Court believes that the decisions conflict, under Supreme Court Rule 10, a conflict between an arbitration decision and a circuit court case does not justify granting certiorari.

Additionally, Petitioner ignores the important factual distinctions made by Arbitrator Nagle between this case and *ITU*. Section I of this Brief cited language from Arbitrator Nagle's decision which distinguished the instant case from *Cuyamaca Meats* because the employer's actions did not harm the fund, and any payment of withdrawal liability could be a windfall for the fund. Arbitrator Nagle applied the same analysis to *ITU*, distinguishing that case from the case before him. Pet. App. 84a-85a.

Arbitrator Nagle correctly analyzed *ITU*, in which Arbitrator Mittleman recognized that his decision was dependent on the specific facts of the case. Like *Cuyamaca Meats*, *ITU* involved an employer's attempt to delay its withdrawal from a fund into the next plan year so that it could benefit from the fund's improved financial status. In *ITU*, 5 EBC at 1198, the arbitrator found that "the critical fact . . . is that contributions were made for the full" previous plan year. Because there "was no unfunded vested liability of the Plan as of the end of" the previous plan year, "any withdrawal liability payment . . .

would simply be a windfall to the Plan, and the remaining employers." *Id.* at 1199. The decision was thus greatly influenced by the fact that the transaction would not harm the fund, and that a withdrawal liability assessment would only be a windfall for the fund. By way of contrast, in the instant case, the Petitioner sought to exit the Fund before the next plan year, rather than delaying its departure, causing significant harm to the Fund.

C. The Third Circuit Was Correct In Refusing to Alter the Plain Language of Section 4212(c)

Petitioner criticizes the Third Circuit's decision for its reliance on dictionary definitions to define the term "evade or avoid." Citing the District Court's decision, it claims that the phrase should have been interpreted as a "term of art," which only refers to fraudulent transactions. Petition 24-25. However, the Third Circuit interpreted section 4212(c) in accordance with its plain language, which does not limit its application to fraudulent or sham transactions.

Because the words used in section 4212(c) were not defined in the statute, the Third Circuit found it necessary to rely on "their ordinary and natural meaning, *United States v. E.I. DuPont De Nemours & Co., Inc.*, 432 F.3d 161, 171 (3d Cir. 2005), and 'the overall policies and objectives of the statute,' *United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997) (citing *Brown v. Gardner*, 513 U.S. 115, 117-19, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994))." Pet. App. 19a. It

used the dictionary definitions to provide a "plain language"[6] reading of the statute, under which "the provision applies when a contributing employer enters a transaction with a principal purpose of escaping its duty to pay withdrawal liability to the plan or fund." *Id.* at 20a.

The Third Circuit correctly refused to add an exception to the plain language of section 4212(c), which does not require that transactions be fraudulent in order to be disregarded. It found that "the statute is clear" that it is not limited "to sham or fraudulent transactions," and, as a result, the Third Circuit did not have to look to the statute's legislative history. Pet. App. 27a-28a.

This refusal to elevate legislative history over the plain statutory text was in accord with this Court's precedent.[7] The Third Circuit cited *Exxon Mobil Corp.*

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[6] The Third Circuit's decision was not the first to employ dictionary definitions in defining the terms of section 4212(c). *See Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Zacek Indus.*, 1994 WL 201042, *3 (N.D. Ill. 1994) (using dictionary definitions to reject the employer's argument that the term "transaction" should be limited); *Sherwin-Williams Co. and New York State Teamsters Conference Pension and Retirement Fund,* 17 E.B.C. 2725, 2748 (M. Gertner, Arb. 1994), *aff'd, Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund*, 969 F. Supp. 465 (N.D. Ohio 1997), and *aff'd, Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund,* 158 F.3d 387 (6th Cir. 1998) (using dictionary definitions of "principal" and "purpose.").

[7] Respondent does not concede that section 4212(c)'s legislative history implies a requirement that a transaction

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v. Allapattah Servs., Inc., 545 U.S. 546, 567-68 (2005) in support of the proposition that it would "not allow an examination of the legislative history to create an ambiguity where none exists in the statute." Pet. App. 28a. In *Exxon*, 545 U.S. at 568, this Court found that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."

The Third Circuit also cited *Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994) in support of its argument that the plain language of the statute "in no way suggests that it only applies to sham or fraudulent transactions." Pet. App. 27a. In *Santa Fe*, 22 F.3d at 729-730, the Seventh Circuit found that the "statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the [MPPAA] by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability . . . is one of the principal purposes of the transaction." *See also Sherwin-Williams Co. v. New York State Teamsters Conference Pension and Retirement Fund,* 158 F.3d 387, 395 (6th Cir. 1998) (finding that section 4212(c) requires only that the desire to evade or avoid withdrawal liability be "a principal purpose" of the transaction, not "the principal purpose," and therefore the

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must be a sham. The Third Circuit merely stated that it was not necessary for it to consider the Act's legislative history.

fact that a transaction may be motivated by multiple principal purposes does not negate the application of the statute.)

The only decision cited by Petitioner in support of its "sham transaction" argument is *ITU*, which is an arbitrator's decision. Its failure to cite any circuit court opinions to contradict the findings in the Third Circuit's decision, *Santa Fe,* and *Sherwin-Williams* means that there is no circuit court split on the issue. There is thus no reason for this Court to grant certiorari given the unambiguous statutory language which does not require that a transaction be a sham or one that is devoid of economic substance.

D. Section 4212(c) Allows Plans to Disregard Any Transaction Having a Principal Purpose to Evade or Avoid Liability

Petitioner criticizes the Third Circuit's determination that an employer does not have the right to choose the date of its withdrawal, and claims that its date of withdrawal was "June 29, 2002 when it ceased to have an obligation to contribute to the Fund under the Termination Agreement." Petition 25-27.[8]

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[8] It is notable that Petitioner does not cite any cases in making this argument. Courts have uniformly found that section 4212(c) allows plans to ignore the purported date of withdrawal if the transaction was enacted to evade or avoid withdrawal liability. *See, e.g., Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698, 701 (W.D.

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Petitioner's argument is based on an inaccurate reading of the statute, and is at odds with the language of MPPAA. It is also an argument on the merits, and does not present any circuit conflict which would justify this Court granting certiorari.

The Third Circuit's determination of the date of withdrawal is derived from the plain language of the statute. The court found that, under section 4212(c), transactions which violate the statute can be disregarded. *Id.* at 24a. Because the Third Circuit "determined that the Termination Agreement violated section 4212(c), the Agreement must be disregarded," and it had to "return to the statute to determine when SUPERVALU actually withdrew." Pet. App. 24a-25a. Under 29 U.S.C. § 1383, "[t]he date of complete withdrawal is the day on which the employer's obligation to contribute to the plan ceases or when all covered operations cease." *Id.* at 25a. Given that "SUPERVALU's cessation of all covered operations

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Mich. 1987) (section 4212(c) "allows transactions made to evade or avoid withdrawal liability to be ignored"); and *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 1995 WL 791371, *4 (D. Del. 1995) (if a sale of a subsidiary is "undertaken principally to avoid MPPAA liability, withdrawal liability would properly be assessed" as if the sale never took place.) The PBGC has provided similar guidance. PBGC Opinion Letters 81-41, 83-18, and 84-7 indicated that, regardless of when a withdrawal occurs under section 1383(a), the transactions could still be ignored by the funds under section 1392(c). *See also* PBGC Op. Letter 85-15 (section 4212(c) "may be applied by a plan, if all the circumstances of the transaction so warrant, to disregard the transaction.").

occurred before its obligation to contribute ceased . . . SUPERVALU actually withdrew when it ceased all covered operations . . . on July 27, 2002." *Id.* at 25a-26a.

The Third Circuit dismissed "SUPERVALU's argument that ignoring the Termination Agreement enables the Fund to just pick a withdrawal date." *Id.* at 25a, fn 12. "[I]gnoring the Termination Agreement does not enable the Fund to pick SUPERVALU's withdrawal date on a whim." *Id.* After a transaction is ignored, the date of withdrawal is determined by MPPAA.[9] *Id.*

E. The Third Circuit's Decision Will Have Little or No Impact on Courts' Application of the Coal Act

Petitioner also claims that certiorari should be granted because the Third Circuit's decision "will also affect implementation of" 26 U.S.C. § 9722, "the 'evade or avoid' provision" of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701, *et seq.* Petition 20. Petitioner also contends that the decision conflicts with *UMWA 1992*

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[9] Petitioner also claims that the Third Circuit incorrectly "assumes an employer that arranges its affairs in a manner that results in a withdrawal in a year with less liability is escaping its 'duty' to pay withdrawal liability." Petition 28. The fallacy of Petitioner's implication is evident from the Third Circuit's noncritical discussion of the lower year liability result reached by the Ninth Circuit in *Cuyamaca Meats*. Pet. App. 24a, fn 10.

Ben. Plan v. Leckie Smokeless Coal Co., 201 B.R. 163, 174 (S.D. W.Va. 1996), which it claims is "the only judicial opinion construing" that statute. *Id.*

As an initial matter, the Coal Act argument should not be considered by the Court because Petitioner raised it for the first time in its Petition for Certiorari. *See Powell v. Nevada*, 511 U.S. 79, 85, fn * (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here.").

The Coal Act arguments may also be dismissed on the merits. Petitioner quotes legislative history indicating that the Coal Act provision is to be "interpreted consistent with Section 4212(c)." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (quoted at Petition 21). However, it cannot cite any case in which a circuit court decision interpreting section 4212(c) (such as *Cuyamaca Meats* or *Santa Fe*) was cited by a court in interpreting the Coal Act. Additionally, the fact that the only case involving this provision is a district court decision which is over 10 years old means that the effect, if any, that the Third Circuit's decision will have on the Coal Act is quite limited.

Because the facts of the two cases are so dissimilar, *Leckie* does not conflict in any way with the Third Circuit's decision. In that case, a company was seeking to buy bankrupt coal operations without assuming liabilities relating to retiree health care under the Coal Act. *Leckie*, 201 B.R. at 167-168. Unlike the instant case, in *Leckie*, the party against whom liability was being asserted was a stranger to the

plan until the transaction was consummated. Petitioner also ignores the distinctions made in *Leckie* between that case and *Santa Fe*, one of the few circuit court decisions interpreting section 4212(c). *Leckie* stated that *Santa Fe* was "inapposite to the case at bar and distinguishable by its extensive factual record on the issue of intent." *Id.* at 174. It went on to list several distinctions between the two cases, including differences between section 4212(c) and the Coal Act provision at issue in *Leckie*. *See id.*[10]

III. There Is No Compelling Reason for this Court to Grant Certiorari

This Court cannot grant a writ of certiorari unless Petitioner presents "compelling reasons." Supreme Court Rule 10. Petitioner claims that its petition should be granted based on this Court's Rule 10(a), which deals with conflicts between two circuit courts of appeals. However, as explained in Section I

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[10] In the Fourth Circuit's decision affirming *Leckie*, *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 578, fn 4 (4th Cir. 1996), the court noted that the parties did not appeal the district court's determination that the transaction did not violate section 9722 of the Coal Act. Despite Petitioner's contention regarding the importance of this Court granting certiorari in employee benefit cases, it denied the petition for certiorari of the Fourth Circuit's decision in *Leckie*. *See United Mine Workers of America 1992 Ben. Plan v. Leckie Smokeless Coal Co.*, 520 U.S. 1118 (Mar. 17, 1997) (NO. 96-1117).

of this Brief, there is no circuit court split because the cases may be distinguished on their facts.

This Court has long held that it "do[es] not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). Certiorari should be denied in cases involving fact-specific issues. *Estelle v. Jurek*, 450 U.S. 1014, 1018 (1981) (Rehnquist, J., dissenting from denial of cert.). "As a general practice the Court does not review cases involving merely individualized circumstances." *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 113 (1959) (Frankfurter, J., dissenting). *See also Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (this Court "adhere[s] to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (this Court should only "grant[ ] the writ of certiorari . . . in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

Petitioner has not presented any compelling reason to justify granting certiorari in this case. Instead, it has largely argued that the Third Circuit's decision was erroneous. Such an argument fails to meet this Court's standard for granting certiorari. *See*

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ").

A. Unlike the Previous Rare Instances in which this Court has Granted Certiorari for MPPAA Cases, this Case Does Not Involve a Circuit Split

In support of its claim regarding the importance of the Third Circuit's decision, Petitioner notes the large number of contributing employers to, and participants covered by, multiemployer pension plans. Petition 28-29. It also cites three cases involving multiemployer plans in which this Court has granted certiorari: *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997); and *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1997).

None of this provides a compelling reason justifying this Court's exercise of its limited resources on this case. Although MPPAA was passed in 1980, and despite the large number of participants in multiemployer funds, Petitioner can only cite three cases in the previous 27 years in which this Court has granted certiorari. Moreover, this case is not at all like those

three cases, which involved explicit splits among circuit courts. *See Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993); *Bay Area Laundry*, 522 U.S. at 200; and *Concrete Pipe*, 508 U.S. at 620.[11]

Additionally, circuit court cases involving section 4212(c) are rare. This Court has denied petitions for certiorari in the few section 4212(c) cases in which it has been requested, such as in *Cuyamaca Meats, cert. denied,* 485 U.S. 1008 (April 18, 1988) (NO. 87-1440); *Santa Fe, cert. denied*, 513 U.S. 987 (Nov. 7, 1994) (NO. 94-449); and *Sherwin-Williams, cert. denied*, 526 U.S. 1017 (Mar. 22, 1999) (NO. 98-1133).

Petitioner also argues that the Third Circuit's opinion could have a large impact because, pursuant to this Court's decision in *Bay Area Laundry*, withdrawal assessments may be made retroactively, and that, based on the Third Circuit's decision, other funds may assess withdrawals going back to 1980. Petition 30-31. This argument, if accepted on its face, would mean that this Court would grant certiorari almost automatically to cases involving withdrawal liability because they all could have retroactive effect. Instead, as noted previously, this Court has only granted certiorari in three MPPAA cases. Finally, it is also unlikely that there will be widespread application of the Third Circuit's decision, given the unusual

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[11] *Concrete Pipe* can be further distinguished because it involved constitutional challenges to provisions of MPPAA.

fact pattern in this case, as well as how rarely section 4212(c) is applied.

B. The Third Circuit's Decision Will Not Discourage Participation in Pension Funds But Will Instead Strengthen Funds

Petitioner claims that the Third Circuit's decision could make companies less likely to agree to contribute to multiemployer pension plans because it would place limitations on their ability to withdraw from funds. Petition 31-32. This ignores the fact that the purpose of MPPAA, as stated in 29 U.S.C. § 1001a, was to strengthen multiemployer pension funds. Congress sought to do so by enacting a withdrawal liability scheme which included a provision allowing funds to disregard transactions whose principle purpose is the evasion or avoidance of liability. Petitioner is essentially arguing that allowing an employer to violate the terms of an act meant to protect pension funds would somehow strengthen those funds.

Finally, Petitioner asserts that the Third Circuit's decision will dissuade companies from seeking information regarding the plan or withdrawal liability under 29 U.S.C. § 1401(e). Petition 32. However, there is nothing in the Third Circuit's decision which indicates that merely requesting and receiving information is enough to justify a finding that a principal purpose of the transaction was to evade or avoid

withdrawal liability. Additionally, Petitioner's argument ignores the fact that § 1401(e) is not designed to provide information to employers solely to help them decide whether to withdraw. *See Brach's Confections, Inc. v. McDougall*, 320 F. Supp. 2d 726, 733-734 (N.D. Ill. 2004) (Section 1401(e) allows employers to access information even after they have withdrawn); *John J. Nissen Baking Co. v. New England Teamsters & Trucking Industry Pension Fund*, 737 F. Supp. 679, 681-683 (D. Me. 1990) (Section 1401(e) is intended, in part, to give withdrawing employers access to information so that they can decide whether the assessment was correct.).

This Court should therefore deny issuance of a Writ of Certiorari for review of the Third Circuit's determination that Petitioner's transaction violated the plain language of section 4212(c), and, pursuant to that statute, the transaction should be ignored.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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